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No. 06-709

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IN THE

Supreme Court of the United States

DARRELL GRAYSON,

Petitioner,

—v.—

TROY KING, Attorney General for the State of Alabama, in his official capacity; ROBERT E. OWENS, JR., District Attorney for Shelby County, in his official capacity; SHELBY COUNTY DISTRICT ATTORNEY'S OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
COA DKT. NO. 05-15725p

REPLY BRIEF FOR THE PETITIONER

PETER J. NEUFELD
VANESSA POTKIN
COLIN STARGER
INNOCENCE PROJECT
100 Fifth Avenue
New York, New York 10011
(212) 364-5340

DAVID BOIES
(*Counsel of Record*)
CHRISTOPHER M. GREEN
BRIAN T. KOHN
IAN M. DUMAIN
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
(914) 749-8200

Attorneys for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR THE PETITIONER 1

I. The Important National Question of Whether There Is a Post-Conviction Right of Access to Potentially Exculpatory Biological Evidence For the Purpose of STR DNA Testing Is Squarely Before This Court Because Alabama Has Not Enacted a Post-Conviction DNA Testing Statute..... 1

1. The Alabama Legislature has not enacted a DNA testing statute..... 1

2. The right Mr. Grayson asserts is narrow, limited and manageable 2

3. The question raised by this case is one of national importance 2

4. The courts of appeals have not spoken with a unified voice on the question presented..... 3

5. Mr. Grayson has a constitutional right of access to the potentially exculpatory biological evidence that was used against him at trial for the purpose of STR DNA testing..... 5

PAGE

II. Mr. Grayson Has a Right of Access to the Potentially Exculpatory Biological Evidence That Was Used Against Him at Trial for the Purpose of STR DNA Testing Under the Facts of His Case 7

1. Mr. Grayson has no recollection of the crime 7

2. STR DNA testing can establish that Mr. Grayson is innocent of the crime for which he was sentenced to die 8

3. The evidence of Mr. Grayson's guilt does not foreclose relief 9

4. Mr. Grayson's request for DNA testing is timely 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

Cases: PAGE

Ake v. Oklahoma, 470 U.S. 68, 83 (1985) 2

Alley v. Key, 2006 WL 1313354 (6th Cir. 2006) . 4, 5

Arizona v. Youngblood, 488 U.S. 51 (1988) 5, 6, 7

Brady v. Maryland, 373 U.S. 83 (1963) 6

Bridgers v. Texas, 532 U.S. 1034 (2001) 5

Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002) .. 3, 4

Harvey v. Horan (Harvey II), 285 F.3d 298 (4th Cir. 2002) 4

Heck v. Humphrey, 512 U.S. 477 (1994) 4

Herrera v. Collins, 506 U.S. 390 (1993) 8, 9

Hill v. McDonough, 126 S.Ct. 2096 (2005) 4

Nelson v. Campbell, 541 U.S. 637 (2004) 4

Osborne v. District Attorney's Office for Third Judicial Dist., 423 F.3d 1050 (9th Cir. 2005) 4

Osborne v. District Attorney's Office for Third Judicial Dist., 445 F.Supp.2d 1079 (D. Alaska 2006) 5

Savory v. Lyons, ___ F.3d ___, 2006 WL 3423072 (7th Cir. 2006) 3, 4

Yarris v. County of Delaware, 465 F.3d 129 (3d Cir. 2006) 6, 7

Rules:

Sup. Ct. R. 10 ..... 2, 3

REPLY BRIEF FOR THE PETITIONER

I. The Important National Question of Whether There Is a Post-Conviction Right of Access to Potentially Exculpatory Biological Evidence For the Purpose of STR DNA Testing Is Squarely Before This Court Because Alabama Has Not Enacted a Post-Conviction DNA Testing Statute.

Darrell Grayson sits on Alabama's death row awaiting execution. STR DNA testing could prove that Mr. Grayson is innocent, as such testing has already done for fourteen other men who had been wrongly convicted and sentenced to die. Unlike the vast majority of other states, Alabama has no post-conviction DNA testing statute. Against this life-and-death backdrop, the State urges that this Court not " 'short-circuit legislative activity' through 'the conversation-stopping process of consitutionalization" because the "democratic dialogue" concerning post-conviction DNA testing is ongoing in Alabama. BIO at 30 (internal citations omitted). "Put simply," the State concludes, "democracy appears to be working, and the Court should let it work." *Id.* This argument is pure folly because there is no indication that Alabama will enact a post-conviction DNA testing law before it executes Mr. Grayson. In reality, only this Court can protect Mr. Grayson's constitutional right of access to the potentially exculpatory biological evidence that was used against him at trial for the purpose of STR DNA testing—at his own expense—that could literally save his life. Certiorari is appropriate.

1. *The Alabama Legislature has not enacted a DNA testing statute.* While the State maintains in its Brief in Opposition ("Opposition") that Mr. Grayson's position that the Alabama Legislature has failed to address the issue of DNA testing "is both irrelevant and misleading," BIO at 29-30, it also admits that that the only DNA bill to get out of committee was not put to a floor vote and has been "indefinitely

postponed." *Id.* The failed efforts of a few Alabama state senators to let Alabama join the vast majority of other states in providing access to biological evidence for the purpose of DNA testing does not weigh against recognizing Mr. Grayson's right of access. Indeed, Alabama's continuing failure to enact *any* statute in the face of the legislative successes in its sister states cuts in favor of Mr. Grayson. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (observing that more than forty states and the federal government already provide indigent defendants with access to psychiatric assistance through legislation or judicial decisions and then holding that the Constitution provides such a right). Despite the State's empty claim that the "democratic dialogue is ongoing," it is likely that if this Court denies certiorari, Mr. Grayson will be executed while awaiting action by the Alabama Legislature.

2. *The right Mr. Grayson asserts is narrow, limited and manageable.* The State asserts that administering a post-conviction right of access would be difficult. BIO at 29. However, the right Mr. Grayson asserts is narrow, limited and manageable. Specifically, Mr. Grayson—a death row inmate—asserts a right of access to the potentially exculpatory biological evidence that the State used against him at trial—which has never before been subjected to DNA testing—for the purpose of DNA testing for which he will pay. A decision in Mr. Grayson's favor would not create an unwieldy universal right to post-conviction DNA testing, but would be limited to the facts present in this case.

3. *The question raised by this case is one of national importance.* Instead of engaging Mr. Grayson on the question of whether his petition presents a question of national importance, the State mischaracterizes Mr. Grayson's argument by recasting it as one concerning a circuit split. Citing only to Supreme Court Rule 10 (a-b) the State argues that certiorari should not be granted in this case because there is no circuit split, which it characterizes as the "chief

reason for granting certiorari." BIO at 9. But Rule 10 does not limit certiorari to resolving conflicts in the circuits or even hold conflicts out for special consideration; indeed, it expressly contemplates review of important national questions. *See* Sup. Ct. R. 10(c).

The courts of appeals that have addressed the question of whether there is a post-conviction right of access to potentially exculpatory biological evidence for the purpose of STR DNA testing agree that it is an important one. *See Savory v. Lyons*, _ F.3d _, 2006 WL 3423072 (7th Cir. 2006) ("Substantive due process or a right to prove actual innocence might also support a post-conviction right of access to physical evidence. But as Savory's claims are not timely we need not reach that determination, as important as it is.") (internal citations omitted); App. 27a ("Our decision here in no way demeans the value of DNA testing or suggests that it should not be made available post-conviction."); *Harvey v. Horan*, 278 F.3d 370, 388 n.7 (4th Cir. 2002) (King, J., concurring) ("[I]t may be that the significant interest of our constitutional system in ensuring justice requires, under the Due Process Clause, that prisoners enjoy access to evidence for the purpose of DNA testing. That, however, in my view, is not an issue within our bailiwick; if any such right exists, it must be recognized by judges of a higher pay grade than those of this Court."). In light of the fact that Mr. Grayson's life hangs in the balance, it is hard to understand the State's position that "there simply is no exigency requiring this Court's review." BIO at 12.

4. *The courts of appeals have not spoken with a unified voice on the question presented.* Despite the State's assertions otherwise, BIO at 9-12, there is no agreement among the courts of appeals on this question; indeed, the decision below is the only published court of appeals decision disposing of a case based on the question presented here.

The State inaccurately characterizes the holding of *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), as consistent with the Eleventh Circuit's decision below. In fact, the Fourth Circuit held that Harvey's claim was barred under the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994). *Harvey*, 278 F.3d at 378. In light of recent decisions of this Court, the Harvey holding in no longer tenable. *See Nelson v. Campbell*, 541 U.S. 637 (2004); *Hill v. McDonough*, 126 S.Ct. 2096 (2005). Indeed, all circuit courts that have considered the *Heck* question since *Nelson* have held that post-conviction DNA actions are properly brought under Section 1983. *See, e.g., Savory*, _ F.3d _, 2006 WL 3423072 (7th Cir. 2006), *Osborne v. District Attorney's Office for Third Judicial Dist.*, 423 F.3d 1050 (9th Cir. 2005). The language in *Harvey* on which the state so heavily relies is mere *dicta* in an otherwise discredited opinion.

Moreover, *Harvey* was later rendered moot when Virginia passed a post-conviction DNA testing statute. *See Harvey v. Horan (Harvey II)*, 285 F.3d 298 (4th Cir. 2002) (Wilkinson, C.J., respecting the denial of a rehearing en banc) ("The question before us is not whether Harvey should or will receive the DNA evidence. He should and he will."). Unlike Mr. Grayson, Harvey obtained DNA testing because of the passage of a state law. In *Harvey II*, Judge Luttig seized the opportunity to write a lengthy and well-reasoned opinion in support of a right of access to potentially exculpatory biological evidence. *Id.* at 317 (Luttig, J., respecting the denial of a rehearing en banc). Taken together, the extensive *Harvey* opinions underscore the importance of the question presented by this case and put the lie to the notion that the federal appellate bench is of a single mind on it.

Respondent also cites the Sixth Circuit's unpublished opinion in *Alley v. Key*, 2006 WL 1313354 (6th Cir. 2006). BIO at 10-11. The State fails to mention, though, that the Sixth Circuit expressly qualified its holding by stating that

"this case and its expedited briefing schedule do not encourage a definitive ruling on all aspects of the matter . . . ." *Compare Osborne v. District Attorney's Office for Third Judicial Dist.*, 445 F.Supp.2d 1079 (D. Alaska 2006) (holding that there is a limited right to post-conviction STR DNA testing and noting that the issue was "well-briefed" by both parties). Moreover, this Court's denial of certiorari in *Alley* is of little consequence. *See Bridgers v. Texas*, 532 U.S. 1034, 1034 (2001) (Breyer, J., respecting the denial of the petition for a writ of certiorari) ("Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim."). Indeed, even in *Alley*'s wake, the court below left open the possibility that some plaintiffs may successfully assert a right of access to biological evidence for post-conviction DNA testing. App. 26a.

5. *Mr. Grayson has a constitutional right of access to the potentially exculpatory biological evidence that was used against him at trial for the purpose of STR DNA testing.* For the reasons set forth in the Petition, the decision of the court below is wrong and contrary to this Court's precedents. While the parties' positions on this issue are clearly set forth in the Petition and Opposition, the State makes one new assertion that requires a response. Specifically, the State asserts that Mr. Grayson has abandoned his reliance on *Arizona v. Youngblood*, 488 U.S. 51 (1988). BIO at 10. He has not.

In *Youngblood*, this Court recognized the State's obligation to preserve evidence in "that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Youngblood*, 488 U.S. at 58. Doctrinally, *Youngblood* concerned "what might loosely be called the area of constitutionally guaranteed access to evidence," *Id.*

at 51 (internal citation omitted) which derives from *Brady v. Maryland*, 373 U.S. 83 (1963). Accordingly, Mr. Grayson's reliance on *Youngblood* below and in this Petition fleshes out the contours of his *Brady*-derived right. *See* Grayson Brief at 9-23 (including *Youngblood* analysis as component of *Brady* argument); Grayson Reply Brief at 9-17 (same).

Youngblood specifically rebuts the State's claim that this Court's precedents only guarantee a defendant's right to "actually, not just potentially, favorable" evidence. BIO at 25. *Younglood* makes clear that "potentially exculpatory evidence" is constitutionally protected and that to destroy such evidence in bad faith violates due process. Moreover, *Youngblood* answers the State's claim that *Brady* is strictly a "fair trial" right that has no post-conviction application. BIO at 22-23. Indeed, the Third Circuit recently applied *Youngblood* in a § 1983 damages action brought by an individual whose conviction and death sentence were earlier vacated and who had alleged that county prosecutors wrongfully withheld biological evidence that could be used for DNA testing after his conviction and sentencing. *See Yarris v. County of Delaware*, 465 F.3d 129, 142 (3d Cir. 2006). There, the Third Circuit explained:

> At the outset, we note that *Youngblood* addresses law enforcement officials' constitutional duty to preserve evidence *prior* to conviction, whereas Yarris's claim is based on the CID Detectives' post-conviction conduct. We nonetheless believe that the Supreme Court's application of the Due Process Clause in *Youngblood* guides our analysis here. However, the *Youngblood* decision did not indicate that it was limited to its temporal context, as it sought to govern applicability of the Due Process Clause in "what might loosely be called the area of constitutionally guaranteed access to evidence" and resolve the violation it described

broadly as "the failure of the State to preserve evidentiary material."

Id. As Mr. Grayson argued below, under *Youngblood*, the protection of potentially exculpatory evidence under the due process clause extends to the post-conviction context.

II. Mr. Grayson Has a Right of Access to the Potentially Exculpatory Biological Evidence That Was Used Against Him at Trial for the Purpose of STR DNA Testing Under the Facts of His Case.

As the Eleventh Circuit recognized, this case presents the question of "whether a defendant has a federal constitutional right to post-conviction access to biological evidence for DNA testing." App. 14a. The State restates the question presented in a manner that seeks to divert attention from the central legal issue by reference to legally irrelevant assertions. This Court should not be distracted by the State's attempt at misdirection. Implicitly, the State suggests that this Court need not consider whether Mr. Grayson is entitled to access the potentially exculpatory biological evidence used against him at his trial because it appears to the State to be very unlikely that such testing would prove Mr. Grayson's innocence. Under the State's logic, this Court should delay its consideration of this important issue until it is raised by a petitioner who can conclusively demonstrate that he is innocent without DNA testing. That logic is self-evidently absurd, and it should be rejected.

1. *Mr. Grayson has no recollection of the crime.* The State is correct that Mr. Grayson has never asserted his actual innocence, but that is only part of the story. Since his trial, Mr. Grayson has consistently maintained that he was too intoxicated on the night of the murder to remember what occurred. Mr. Grayson's absolute and long-standing inability to recall the events in question has made it impossible for him to honestly assert his actual innocence; he simply does not know what happened. To predicate Mr. Grayson's

right of access to the potentially exculpatory biological evidence used against him at trial for the purpose of STR DNA testing because he cannot disclaim involvement in the crime would place him in an untenable Catch-22: to secure access to the evidence, Mr. Grayson would need to have "steadfastly" maintained his innocence; yet Mr. Grayson's ability to claim innocence is contingent on exculpatory DNA test results.

2. *STR DNA testing can establish that Mr. Grayson is innocent of the crime for which he was sentenced to die.* In his petition, Mr. Grayson explains in great detail the way in which STR DNA testing can establish that he is innocent of the crime for which he was convicted and has been sentenced to die. Pet. 12-15. Indeed, in order to counter the State's steadfast refusal to acknowledge that STR DNA testing is indeed capable of exonerating him, Mr. Grayson provided this Court with examples of cases analogous to his case in critical respects in which individuals have been exonerated by STR DNA testing. *Id.* at 15-19.

The State argues that even an STR DNA test that excludes Mr. Grayson as the source of the semen stains on the victim's nightgown and bedsheet could not prove that he is innocent of the crime for which he was convicted because Mr. Grayson was convicted of burglary-murder and not rape-murder. BIO at 17. The State's rigid analysis is intentionally blind to the realities of modern STR DNA testing. Indeed, in the Petition, Mr. Grayson provided two examples of cases in which STR DNA testing led to a CODIS hit and the apprehension of the real perpetrator. Pet. 17-19. The same result is possible here.

Instead of acknowledging that STR DNA testing can exclude Mr. Grayson as the source of the crime scene evidence in this case and lead to the real perpetrator, the State nakedly asserts that Mr. Grayson will never—no matter where STR DNA testing leads—be able to make the truly

persuasive showing of actual innocence required under *Herrera v. Collins*, 506 U.S. 390 (1993) to state a constitutional claim. BIO at 19. But Mr. Grayson need not make a truly persuasive showing of actual innocence at this stage. And experience shows that it would be foolish to assume what Mr. Grayson will or will not be able to prove after STR DNA testing is performed on the evidence in his case.

3. *The evidence of Mr. Grayson's guilt does not foreclose relief.* The State asserts that, independent of the biological evidence at issue here, there is "overwhelming" evidence of Mr. Grayson's guilt. BIO at 13-16. That evidence, while significant, is beside the point. It is beyond dispute that in each of the 187 DNA exonerations to date a jury found an innocent defendant guilty *beyond a reasonable doubt*. In many of these cases, the evidence against the defendant appeared as or more overwhelming than it appears in this case.

4. *Mr. Grayson's request for DNA testing is timely*. Finally, the State complains that Mr. Grayson waited until "the eleventh hour" to seek DNA testing "as a way to postpone his execution" and that he has "offered no explanation whatsoever for his delay." BIO at 20-21. The State, however, fails to explain how the timing of Mr. Grayson's request is at all relevant to his assertion of a constitutional right of post-conviction access to the biological evidence used against him at trial. Moreover, the State fails to acknowledge that individuals who languished in prison for years without asserting their innocence have been exonerated by DNA testing.

Ultimately, what matters for present purposes is that Mr. Grayson's § 1983 action is not time-barred. In its motion to dismiss, the State argued that this action is barred by the statute of limitations. The magistrate expressly declined to address the issue, the District Court did not mention it in its memorandum opinion, and the State did not raise the issue on appeal. App. 46a; App. 30a-32a. In any event, the State

could end the delay of which it complains at any time by consenting to the testing that Mr. Grayson seeks. Nevertheless, despite Mr. Grayson's repeated offers to pay for the testing and the fact that results would be available within a month, the State has repeatedly refused to consent. The delay associated with the pendency of this action is wholly chargeable to the State.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, certiorari should be granted.

December 22, 2006

Respectfully submitted,

DAVID BOIES
Counsel of Record
CHRISTOPHER M. GREEN
BRIAN T. KOHN
IAN M. DUMAIN
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

PETER NEUFELD
VANESSA POTKIN
COLIN STARGER
INNOCENCE PROJECT
100 Fifth Avenue
New York, NY 10011
(212) 364-5340